OPINION NO. 86-3
March 1, 1986

FACTS:

The inquiring attorney wants to know whether or not a lawyer who is "counsel" to the firm, but is not a shareholder or associate, may share fees under the following circumstances. The Committee presumes that the lawyer is, in fact, "of counsel" to the firm, and that his relationship to the firm is close and continuing.

All fees generated for work being done by either the firm or "counsel" for clients who had traditionally been the clients of the other will be kept track of and, at the end of the normal accounting cycle, if there is an excess of work handled by either the firm or "counsel" for the clients of the other, then a percentage of that excess will be paid to the one who is "short" on the basis of work done. This will not be done on the basis of individual bills, and the client will not be told of the arrangement since no payment will be made unless things do not balance out at the end of the accounting period.

QUESTION:

May an attorney ethically divide fees with another attorney who is "counsel" to the firm based upon the amount of work done for all clients without regard to the individual clients as such?

ETHICAL RULE INVOLVED:

ER 1.5. Fees

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(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

OPINION:

There were many opinions interpreting the question of fee-splitting written before the adoption of the new Rules of

Professional Conduct. The opinions contemplate that a lawyer's fee should not exceed the value of the services rendered. A division of fees must be made on a division of service or responsibility. If a lawyer merely brings about the employment of another lawyer, but renders no service and assumes no responsibility, a division of the fee is improper.

Informal Opinion 1392 of the American Bar Association Committee, dated June 2, 1977, said that a uniform percent fee split required by a law firm does not establish a division of fees in proportion to services performed and responsibility assumed as required by DR 2-107(A)(2) of the Code of Professional Responsibility. In those instances where the law firm's services to the client consist solely of a referral to another law firm, such would not be sufficient to entitle the firm to any part of a fee.

It is submitted that the new Rules of Professional Conduct which became effective in Arizona on February 1, 1985, would not alter this requirement. It would seem that, if the client is informed that there are other lawyers working on his case, disclosure is not necessary as to the share of the fee each lawyer is to receive. Since the intent in this case is to pay an excess to the lawyer on the basis of the amount of work done, it would be in conformance with ER 1.5(e)(1).

It is the opinion of the Committee that it is ethically permissible to divide fees so long as (1) the client is advised of and does not object to the participation of the lawyers involved, even though the share of the fee that each lawyer is to receive does not have to be disclosed, and (2) the division of fee is based upon the amount of work performed by the respective lawyers. The plan which is the subject of this request does not conform to these standards. Thus, it is our opinion that the proposed fee division is not permissible under ER 1.5.